

**BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A**

IN RE: JOHNNY E. GROSS

Arkansas Bar ID #95156

CPC Docket No. 2008-020

FILED

JUN 23 2008

**LESLIE W. STEEN
CLERK**

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based were developed from information obtained from Court orders and case file documents. The information related to the representation of Roger Dale Barrett in Benton County Circuit Court No. CR-2000-1190-1, *State v. Roger Barrett*, by Respondent Johnny E. Gross, an attorney practicing primarily in Benton County, Arkansas. On or about March 18, 2008, Respondent was served with a formal complaint, supported by parts of the record, testimony, and orders in Supreme Court cases CR-02-584 and CR-06-1490.

Roger Barrett was charged with capital murder in the August 22, 2000, death of Eunice "Yogi" Bradley, and initially was represented by appointment by Charles Duell, the public defender for Benton County, Arkansas. Mr. Gross succeeded to the representation as retained counsel, and continued through trial. Barrett did not testify at his trial. Barrett was convicted and sentenced to life without parole in September 2001.

Mr. Gross had been licensed as an attorney for somewhat over five years when he started his representation of Barrett. At the time he became Barrett's attorney, Gross had two years of private law practice, very limited criminal law experience, two jury trials, and had never tried a murder case. Eric Hagler represented Barrett in his direct appeal. The conviction was affirmed in September 2003, in No. CR-02-584, *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). A Rule 37 petition for

post-conviction relief, on the basis of ineffective assistance of trial counsel (Mr. Gross), was filed.

After a hearing on the Rule 37 Petition in February 2006, the same trial judge (Honorable Tom Keith) found that Barrett was entitled to relief in the form of a new trial. The State appealed. The trial court's decision granting relief to Barrett was affirmed in No. CR-06-1490 in September 2007. The Office of Professional Conduct was informed on March 4, 2008, that Barrett's retrial is set for June 17, 2008. The details of Mr. Gross's conduct in the trial court representation of Barrett are set out in the Opinion in No. CR-06-1490 and below.

The 2003 Opinion from Barrett's direct appeal reveals that Roger Barrett and the decedent, Eunice "Yogi" Bradley, were having an affair while Roger Barrett was married to Nola Barrett. On the night of Ms. Bradley's death, she went to the home of Nola and Roger Barrett. All three were later at the Barrett home at the same time. According to Roger's testimony at the 2006 Rule 37 hearing, Nola left, Roger and Ms. Bradley were alone, and she died at the Barrett residence after an accidental shooting during their struggle over a pistol. Roger then went to the Steenblock residence where Nola was. Roger told Nola and Ms. Steenblock that he had accidentally shot Ms. Bradley. The three then went to the Barrett home, where they found Ms. Bradley dead on the living room couch from a gunshot wound. Apparently in the presence of both women, and with the assistance of Nola, Roger then stripped the covers off the sofa cushions and put them in the wash. There was evidence that when Nola called the Steenblock residence that night, there were sounds of an argument in the background. At trial, Roger, through counsel Gross, attempted unsuccessfully to keep out testimony of "confidential information" between Nola and Roger, that he told her he had accidentally shot Ms. Bradley.

In his response, among other matters offered, Mr. Gross stated that his client, Roger Barrett,

gave him five versions of what happened, all being accidental, and another version by the time of the Rule 37 hearing. He stated that other facts in the case caused him major problems with the client's version that the shooting was an accident. He also stated that Nola Barnett gave several stories, was a suspect, and he kept her out of his meetings with his client Roger. He stated that the public defender, Mr. Duell, agreed with Gross at trial time that Mr. Barrett's "accident theory" was not a viable trial strategy. Mr. Gross denied soliciting Mr. Barnett as a client away from the public defender, through the relationship between Gross's secretary and Barnett's son. Gross stated he discussed with his client all plea offers received, and the client rejected all. He stated he had nothing to do with Nola Barrett being approached about taking, or actually taking, the Fifth Amendment at Roger's trial.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, and other matters before it, and the Arkansas Model Rules of Professional Conduct, Panel A of the Arkansas Supreme Court Committee on Professional Conduct finds:

A. Mr. Gross's conduct violated Model Rule 1.1 in that the Supreme Court of Arkansas found that, as trial counsel for Roger Barrett, Mr. Gross failed to formulate any kind of trial strategy and did not use reasonable professional judgment. In the Rule 37 proceeding, the trial judge found that, as trial counsel for Roger Barrett, Mr. Gross failed to formulate any kind of trial strategy and did not use reasonable professional judgment. In the Rule 37 proceeding, the trial judge found that, as trial counsel for Roger Barrett, Mr. Gross failed to advise, counsel and communicate with Barrett as to his right to testify at his trial. In the Rule 37 proceeding, the trial judge found that, as trial counsel for Roger Barrett, Mr. Gross solicited Barrett's case away from his more experienced and capital-case-qualified public defender attorney by "badmouthing" the public defender and misleading

Barrett. In the Rule 37 proceeding, the trial judge found that, as trial counsel for Roger Barrett, Mr. Gross's trial performance was significantly affected by his conflicting interests with Nola Barrett, spouse of Roger Barrett. In the Rule 37 proceeding, the trial judge found that, as trial counsel for Mr. Barrett, Mr. Gross failed to communicate a better plea offer to Barrett and give Barrett an appropriate opportunity to consider and respond to the better, reduced charge-twenty year sentence offer.

Model Rule 1.1 requires that a lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

B. Mr. Gross's conduct violated Model Rule 1.2(a) in that the primary objective of Roger Barrett in his capital murder case was to either be acquitted or receive the lowest grade of offense and the lightest sentence he reasonably could obtain, if convicted of any crime. The theory of "accidental shooting" death of Eunice Bradley had been presented to the jury through other witnesses. If this theory had been presented to the jury through testimony of Roger Barrett and Nola Barrett, which Mr. Gross resisted, Roger Barrett could well have been convicted of the lesser included felony offenses of second degree murder, manslaughter, or even misdemeanor negligent homicide. The primary objective of Roger Barrett in his capital murder case was to either be acquitted or receive the lowest grade of offense and the lightest sentence he reasonably could obtain, if convicted of any crime. If Mr. Gross had properly presented to Roger Barrett the "murder two and twenty year" plea offer made on the eve of trial by the prosecutor's office, Mr. Barrett could have had a reasonable opportunity to make an informed decision on whether to accept this plea offer. The record reflects Mr. Barrett did not make the decision regarding acceptance of this last plea offer. Mr. Gross made the decision, communicated it to the State, and then communicated his decision to Mr.

Barrett. If Mr. Gross had properly counseled with Roger Barrett as to the decision on Barrett testifying on his own behalf at his trial, there is a significant chance the outcome of the trial would have been materially more favorable to Barrett than the result he received. The record reflects that Mr. Gross did not appropriately counsel with Roger Barrett on the decision as to whether Barrett would testify at trial. The record of the trial reflects that Roger Barrett was questioned about his right to testify or not to testify at trial only after the defense rested, any then only by the trial judge, not by Barrett's counsel. The record is silent as to any dialog on Barrett's right and decision to testify when it was meaningful, that is, before his side rested at trial. Model Rule 1.2 (a) requires that a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

C. Mr. Gross's conduct violated Model Rule 1.7(a) in that while representing Roger Barrett, the only person charged in the case involving the death of Eunice Bradley, Mr. Gross either directed or allowed his secretary, who was having an affair with Barrett's step-son, to convey to Nola (Mrs. Roger) Barrett, also a suspect in the Bradley death, that Nola should take the "Fifth Amendment" if called to testify in Mr. Barrett's trial. This act amounted to Gross giving legal advice to Nola Barrett, and impliedly making her his client, when Gross knew, or reasonably should have known, that Mrs. Barrett's interests were adverse to his client Roger Barrett. There is no evidence Roger Barrett knew of Gross's communication with Nola Barrett or consented to the relationship after any consultation with Mr. Gross. Model Rule 1.7(a) provides that a lawyer shall not represent a client

if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.

D. Mr. Gross's conduct violated Model Rule 1.7(b) in that while representing Roger Barrett, the only person charged in the case involving the death of Eunice Bradley, Mr. Gross either directed or allowed his secretary, who was having an affair with Barrett's step-son, to convey to Nola (Mrs. Roger) Barrett, also a suspect in the Bradley death, that Nola should take the "Fifth Amendment" if called to testify in Mr. Barrett's trial. This act amounted to Gross giving legal advice to Nola Barrett, and impliedly making her his client, when Gross knew, or reasonably should have known, that Mrs. Barrett's interests were adverse to his client Roger Barrett, and that Gross's continued representation thereafter of Roger Barrett would be materially limited by Gross's responsibility to Nola Barrett, whom he was advising not to testify. On the evening of Ms. Bradley's death, Roger Barrett claims he told Nola Barrett that the shooting was an accident, information which, if testified to by Nola Barrett at Roger's trial, would have supported a much reduced charge such as manslaughter or less. Gross's advice to Nola Barrett was clearly adverse to the interests of Roger Barrett. There is no evidence Roger Barrett knew of Gross's communication with Nola Barrett or consented to their attorney-client relationship after any consultation with Mr. Gross. Model Rule 1.7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

E. Mr. Gross's conduct violated Model Rule 4.2 in that knowing that Roger Barrett was

represented by the public defender office in his capital murder case, Mr. Gross arranged for his legal secretary, girl-friend to Barrett's step-son, to communicate with Barrett for the purpose of setting up a meeting between Gross and Roger Barrett at Barrett's residence, for the purpose of exploring the possibility that Gross could become Barrett's attorney in the same case, without informing Barrett's counsel or obtaining his consent to the meeting, and not being otherwise authorized by law to meet with Barrett under the circumstances. Model Rule 4.2 requires that, in representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

F. Mr. Gross's conduct violated Model Rule 4.3 in that he dealt with an unrepresented person, Nola Barrett, by having his legal secretary communicate to Mrs. Barrett, who was at the time living with her husband, that Mrs. Barrett should "take the Fifth Amendment" and not testify at Roger Barrett's trial, and Gross did not state or imply in this communication to Nola Barrett that in this matter Gross was disinterested, or take any reasonable steps thereafter to correct the misunderstanding. Model Rule 4.3 requires that in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

G. Mr. Gross's conduct violated Model Rule 7.3 in that Mr. Gross in person solicited professional employment in his pending capital murder case from Roger Barrett, at Barrett's residence, for a \$15,000 fee to Gross. Model Rule 7.3(a) requires that a lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the

lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

H. Mr. Gross's conduct violated Model Rule 8.4(d) in that his failure to provide effective representation to his client in a capital murder trial resulted in the granting of post-conviction relief to his former client and a new trial, after a circuit hearing on the petition for relief and a second appeal on that issue, both matters taking unnecessary time of the court system, and that would not have been required but for Mr. Gross's ineffective assistance of counsel to Mr. Barrett or if Gross had declined the Barrett representation, a matter which he was not then sufficiently equipped and experienced to properly handle. Mr. Gross's communication to Nola Barrett to "take the Fifth Amendment" and not testify in his client Roger Barrett's case, was prejudicial to the fair administration of justice in Mr. Barrett's case, as Mrs. Barrett, a non-charged person, had material, even critical, evidence to offer at trial as to the circumstances of the death of Eunice Bradley. Model Rule 8.4(d) requires that a lawyer shall not engage in conduct that is prejudicial to the administration of justice.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that the Arkansas law license of **JOHNNY E. GROSS**, Arkansas Bar ID# 95156, be, and hereby is, **SUSPENDED FOR TWELVE (12) MONTHS** for his conduct in this matter, and he is assessed \$50.00 Committee costs. The suspension shall become effective on the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court. The \$50.00 costs assessed herein shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct with thirty (30) days of the date this Findings and Order is filed of record with

the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT - PANEL A

By: Steven Shults
Steven Shults, Chair, Panel A

Date: May 28, 2008